

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
AMTS CONSORTIUM, LLC) File No. 0002147762
)
Application to Partially Assign License for Station)
WQCP810 to Northeast Utilities Service Company)

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 2010

Released: January 7, 2010

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny an Application for Review filed by Paging Systems, Inc. (PSI) related to the above-captioned application to assign Automated Maritime Telecommunications System (AMTS) frequencies from AMTS Consortium, LLC (ACL) to Northeast Utilities Service Company (NUSCO).¹

II. BACKGROUND

2. ACL was the high bidder in Auction No. 57 for the geographic license for AMTS Channel Block B in the Northern Atlantic region.² The Wireless Telecommunications Bureau (Bureau) denied PSI's petitions seeking to set aside the results of the auction and reopen the application process.³

3. ACL subsequently filed the above-captioned application to assign part of the geographic license to NUSCO.⁴ ACL and NUSCO submitted a copy of their purchase agreement ("the Agreement") in conjunction with the application.⁵ They requested confidential treatment of certain terms of the Agreement, and provided a redacted copy for the public file.⁶

¹ Application for Review by Paging Systems, Inc. (filed Mar. 1, 2007) ("Application for Review"). On March 23, 2007, ACL and NUSCO each filed a separate Opposition to Application for Review (respectively, the "ACL Opposition" and the "NUSCO Opposition"). PSI submitted a Reply to Oppositions ("Reply") on April 5, 2007.

² See Wireless Telecommunications Bureau Announces the Grant of 10 Automated Maritime Telecommunications System Licenses, *Public Notice*, 20 FCC Rcd 8244, 8244 (WTB 2005).

³ See Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., *Order*, 20 FCC Rcd 8087 (WTB 2005), *review pending*. PSI argued that it was anticompetitive to permit both ACL and another entity controlled by the same individual to participate. See Petition for Reconsideration by Paging Systems, Inc. (filed Oct. 14, 2004); Motion for Stay by Paging Systems Inc. (filed Oct. 14, 2004). PSI's application for review of the Bureau's decision remains pending. See Application for Review by Paging Systems, Inc. (filed May 23, 2005).

⁴ Specifically, ACL proposed to partition the entire channel block in New Hampshire, western Massachusetts (Berkshire and Franklin Counties, and parts of Worcester, Hampshire, and Hamden Counties), and eastern Connecticut (Windham, Tolland, Hartford, New London, and Middlesex Counties, and parts of New Haven, Litchfield, and Fairfield Counties); and to partition and disaggregate part of the channel block in the remaining parts of New Haven, Litchfield, and Fairfield Counties.

⁵ See 47 C.F.R. § 1.2111(a) ("An applicant seeking approval for a transfer of control or assignment . . . of a license within three years of receiving a new license through a competitive bidding procedure must, together with its

(continued....)

4. PSI⁷ filed a petition to deny the application. The Bureau's Public Safety and Critical Infrastructure Division (PSCID) denied the petition to deny, and granted the ACL/NUSCO request for confidential treatment. PSCID concluded that PSI lacked standing to file the petition to deny,⁸ but it granted PSI's alternative request that the petition be deemed an informal request for relief pursuant to Section 1.41 of the Commission's Rules.⁹

5. On the merits, PSCID found that the redacted Agreement satisfied the Commission's rules.¹⁰ It also concluded that confidential treatment was appropriate because "the redacted information could be of interest and benefit to their competitors to the detriment of ACL and NUSCO."¹¹ PSI filed a petition for reconsideration, arguing that (1) it had standing; (2) the redacted portions of the Agreement should be made public, or at least released to PSI under an administrative protective order; and (3) any grant of the assignment application should be expressly conditioned on the outcome of PSI's application for review challenging the results of Auction No. 57.¹²

6. While PSI's petition for reconsideration of PSCID's *Order* was pending, PSCID denied PSI's petition to deny ACL's application for AMTS licenses for which ACL was the high bidder in Auction No. 61.¹³

7. The Bureau's Mobility Division (Division)¹⁴ denied PSI's petition for reconsideration of PSCID's *Order*. The Division stated that because PSCID had addressed the merits under Section 1.41, a decision as to whether PSI had standing "would not afford PSI any actual relief in this matter."¹⁵ Regarding the decision to afford confidential treatment to portions of the Agreement, the Division explained that PSCID had reviewed not only the request for confidential treatment, but also the unredacted Agreement, and

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application for transfer of control or assignment, . . . file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the local consideration that the applicant would receive in return for the transfer of assignment of its license.").

⁶ See 47 C.F.R. § 0.459(a)(1).

⁷ PSI is the licensee of incumbent site-based AMTS Station WQA216, New York, New York.

⁸ PSCID concluded that PSI did not demonstrate that the service contours of Station WQA216 overlapped any of the areas to be partitioned. See AMTS Consortium, LLC, *Order*, 20 FCC Rcd 17975, 17976-77 ¶ 4 (WTB PSCID 2005) (*Order*).

⁹ 47 C.F.R. § 1.41.

¹⁰ See *Order*, 20 FCC Rcd at 17977-78 ¶ 8 (stating that the purpose of the requirement in Section 1.2111(a) is to monitor whether the Commission's competitive bidding procedures result in high bids that reflect licenses' true market value).

¹¹ *Id.* at 17978 ¶ 9.

¹² See Petition for Reconsideration by Paging Systems, Inc. (filed Dec. 8, 2005).

¹³ See Intelligent Transportation & Monitoring Wireless LLC, *Order*, 21 FCC Rcd 8791 (WTB PSCID 2006), *recon. pending*. As it had with respect to Auction No. 57, PSI argued that the participation of both ACL and another entity controlled by the same individual was improper. See *id.* at 8792 ¶ 3. PSI's petition for reconsideration of PSCID's decision remains pending. See Petition for Reconsideration by Paging Systems, Inc. (filed Sept. 5, 2006).

¹⁴ Pursuant to a Commission reorganization effective September 25, 2006, certain duties of the Public Safety and Critical Infrastructure Division were assumed by the Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

¹⁵ See AMTS Consortium, LLC, *Order on Reconsideration*, 22 FCC Rcd 1597, 1597 ¶ 4 (WTB MD 2007) (*Order on Reconsideration*).

the Division agreed with NUSCO that further explaining the redacted information would itself have disclosed confidential information.¹⁶ Finally, the Division concluded that it was appropriate not to condition consent to the assignment application on the resolution of PSI's Auction No. 57 application for review, because PSI's filing of an application for review did not by itself stay the challenged action.¹⁷

III. DISCUSSION

8. In its instant Application for Review, PSI urges the Commission to rescind its consent to the assignment application, make the unredacted Agreement public or at least available to PSI pursuant to a protective order, and thereafter allow PSI to supplement its petition to deny. It also argues that the Division must condition any grant of the assignment application on the resolution of PSI's pleadings challenging ACL's participation in Auctions Nos. 57 and 61. We reject each of these arguments, and address them in detail below.¹⁸

9. *Standing.* The Division's decision to consider the merits of PSI's arguments without resolving the issue of standing was consistent with Commission precedent.¹⁹ Moreover, PSI does not allege that it was harmed by the grant of its alternative request that the merits be addressed pursuant to Section 1.41. We agree with the Division, and NUSCO,²⁰ that resolving the standing issue would not afford PSI any actual relief in this matter. We therefore affirm the Division's decision on this issue.

¹⁶ *Id.* at 1597 ¶ 5.

¹⁷ *Id.* at 1598 ¶ 5.

¹⁸ On May 14, 2007, PSI supplemented its Application for Review to seek access to an amended version of the Agreement that ACL and NUSCO had subsequently filed pursuant to Section 1.65(a) of the Commission's Rules, 47 C.F.R. § 1.65(a) (applicants are responsible for the continuing accuracy and completeness of an application until it is no longer subject to Commission or judicial review). *See* Letter dated Apr. 17, 2007 from Martin W. Bercovici to Marlene H. Dortch, Office of the Secretary, Federal Communications Commission. Because the parties requested confidential treatment of the amendment, only a redacted copy was made public. NUSCO and ACL opposed the supplement on May 25 and 31, 2007, respectively, and PSI replied on June 8, 2007. While we agree with ACL that the amendment is beyond the scope of the Application for Review, we grant PSI's motion for leave to file the supplement and will consider the issue, in the interest of administrative efficiency. *See* Goosetown Enterprises, *Memorandum Opinion and Order*, 16 FCC Rcd 12792, 12794-95 ¶ 7 (2001). Our discussion *infra* regarding whether PSI should be permitted to examine the unredacted Agreement thus will apply equally to the amended Agreement.

After NUSCO and ACL filed applications to redistribute some of the channels that were assigned pursuant to the above-captioned application (*i.e.*, NUSCO would return some of the assigned channels to ACL in exchange for different channels), *see* FCC File Nos. 0003041229, 0003042377 (filed May 24, 2007), PSI filed comments on the applications on June 13, 2007 and a second supplement to the Application for Review on July 2, 2007. NUSCO opposed the second supplement on July 17, 2007, and PSI replied on July 27, 2007. On February 12, 2008, the Division conditioned its consent to the applications on the outcome of the instant Application for Review (as PSI requested in its comments), which renders moot the request for relief in the second supplement. *See* AMTS Consortium, LLC, *Letter*, 23 FCC Rcd 1833, 1834 (WTB MD 2008). The second supplement also included a revised contour map that PSI filed to demonstrate that its service contour overlaps the partitioned area, but PSI has not explained why it could not submit this information earlier. Moreover, an application for review may not rely on questions of law or fact upon which the designated authority was afforded no opportunity to pass. *See* 47 C.F.R. § 1.115(c). We therefore deny PSI's motion for leave to file the second supplement. Moreover, given our resolution of the standing issue, *infra*, the contour information is not material.

¹⁹ *See, e.g.*, Applications for the Assignment of License from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C., *Memorandum Opinion and Order*, 21 FCC Rcd 14863, 14880 n.110 (2006); Applications of Nextel Communications, Inc. and Sprint Corporation, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 14021 n.335 (2005).

²⁰ *See* NUSCO Opposition at 2-3.

10. *Confidential Treatment of the Agreement.* Section 1.2111(a) of the Commission's Rules provides that a licensee seeking to transfer or assign a license obtained at auction within three years of the grant must submit a copy of the agreement with the transfer or assignment application. As PSCID noted, "The primary purpose of the requirement in Section 1.2111(a) . . . is 'to monitor transfers of licenses awarded by competitive bidding in order to accumulate the data necessary to evaluate our auction designs and judge whether "licenses [have been] issued for bids that fall short of the true market value of the license,"' and not to facilitate public scrutiny of private transactions."²¹

11. Parties submitting information to the Commission may request that a portion of a document be withheld from public inspection, and submit a redacted version for the public file.²² The Commission's rules protect from public inspection materials containing "Trade secrets and commercial or financial information . . ." ²³ The rules list six subcategories of data that automatically qualify for protection from disclosure,²⁴ and provide for protection of other material upon submission of a "statement of the reasons for withholding the materials from inspection."²⁵ The filing party must demonstrate by a preponderance of the evidence that confidential treatment is appropriate "consistent with the requirements of the Freedom of Information Act."²⁶

12. As PSI notes,²⁷ "requests for confidentiality . . . in licensing proceedings . . . should remain relatively rare."²⁸ That does not mean, however, that we will never grant confidentiality requests for material submitted under Section 1.2111(a). Indeed, the Commission anticipated such requests, stating that "[a]ny competitive concerns raised by the possible disclosure of sensitive information contained in purchase agreements or similar documents can be addressed" by the Commission's non-disclosure rules.²⁹ The Commission has been "sensitive to ensuring that the fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage."³⁰

13. PSI argues that the ACL/NUSCO confidentiality request offered only vague and conclusory statements that were not sufficient under the Commission's rules to demonstrate that confidential treatment was appropriate.³¹ Specifically, PSI contends that ACL and NUSCO have offered "no

²¹ See *Order*, 20 FCC Rcd at 17977-78 ¶ 8 (quoting Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2385 ¶ 214 (1994) (quoting H.R. Rep. No. 111, 103d Cong., 1st Sess. 257 (1993))).

²² 47 C.F.R. § 0.459(a)(1).

²³ 47 C.F.R. § 0.457(d) (citing 5 U.S.C. § 552(b)(4)).

²⁴ See 47 C.F.R. § 0.457(d)(1)(i)-(vi), (d)(2).

²⁵ 47 C.F.R. § 0.459(b).

²⁶ 47 C.F.R. § 0.459(d)(2) (citing 5 U.S.C. § 552); see also Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816, 24830 ¶ 19 (1998) (*Confidentiality Order*).

²⁷ Application for Review at 8.

²⁸ *Confidentiality Order*, 13 FCC Rcd at 24839 ¶ 34.

²⁹ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2386 ¶ 215 (1994) (citing 47 C.F.R. §§ 0.457, 0.459).

³⁰ *Confidentiality Order*, 13 FCC Rcd at 24822 ¶ 8; see also *id.* at 24839 ¶ 34 ("a party should not necessarily be required to forego confidential information as a condition of obtaining a license").

³¹ Application for Review at 9.

explanation of how disclosure could result in substantial competitive harm,” such as identifying the competitors from whom the redacted material should be withheld.³² PSI further argues that the “nature of any detriment . . . is not quantified or even identified.”³³

14. Contrary to PSI’s assertions, ACL and NUSCO provided sufficient information about how disclosure of the redacted material could harm them. They indicated that the redacted portions of the Agreement pertain to the “consideration to be paid [by NUSCO] and [each party’s] limits of liability and other economic terms and conditions”³⁴ such as “the timing of payment(s), applicable interest rates, and other terms that could impact the ultimate net income received by [ACL].”³⁵ According to ACL and NUSCO, disclosure “could potentially damage their business plans and prospects,”³⁶ because revealing the redacted terms and conditions would put them at a disadvantage in negotiating transactions with future partners.³⁷ We agree with the Division that ACL and NUSCO adequately demonstrated that the redacted material in the Agreement should be afforded confidential treatment. We also agree with the Division’s conclusion that further describing the redacted information would disclose sensitive data.³⁸

15. The cases cited by PSI regarding the sufficiency of the confidentiality request are distinguishable. *Northeast Communications of Wisconsin* concerned data regarding an auction participant’s financial position, which was germane to whether it qualified for certain bidding credits.³⁹ The Commission denied confidential treatment because the submitter had, by requesting a bidding credit, “placed in issue the very information which it sought to shield from public scrutiny.”⁴⁰ In contrast, Section 1.2111(a) requires the filing of purchase agreements to assess the Commission’s competitive bidding processes, not the parties’ qualifications.⁴¹ We agree with the Division that this purpose can be served without public disclosure of sensitive information.⁴²

³² *Id.*

³³ *Id.*

³⁴ See Request for Protection under § 0.459 and § 0.457 Attaching Document Subject of this Request: Filing under Section 12.111(a) at 3 (filed July 13, 2005) (“July 2005 Request”).

³⁵ *Id.*; see also Reply to Opposition to Request for Protection under §§ 0.459 and 0.457 at 2 (filed Aug. 3, 2005) (“August 2005 Request”).

³⁶ July 2005 Request at 3. The parties negotiated a non-disclosure agreement to ensure that neither would reveal sensitive data that would expose their respective financial situations. See *id.* at 4. Although we agree with PSI that it is not relevant to the issue of how disclosure of sensitive data could result in harm, the non-disclosure agreement is relevant with respect to 47 C.F.R. § 0.459(b)(6) (concerning “measures taken by the submitting party to prevent unauthorized disclosure”).

³⁷ July 2005 Request at 3-4; August 2005 Request at 2.

³⁸ See NUSCO Opposition at 7. At some point, explanation of material subject to a confidentiality request may become so detailed that it defeats the purpose of affording protection under our rules. See, e.g., J.A. Savage, *Memorandum Opinion and Order*, 5 FCC Rcd 819, 820 ¶ 9 (1990).

³⁹ Application of Northeast Communications of Wisconsin, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 3289, 3290 ¶ 3 (2000) (*Northeast Communications*). See 47 C.F.R. §§ 1.2110(f) (revenue limits for specific bidding credit levels), 1.2112(b) (revenue disclosure requirements for bidding credits).

⁴⁰ *Northeast Communications*, 15 FCC Rcd at 3291 ¶ 6. The Commission noted that other bidders had “an interest in knowing whether Northeast legitimately qualifie[d] for bidding credits.” *Id.*; cf. *Bartholdi Cable Company, Inc., v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (finding that the public had a compelling interest in the information at issue because it had a direct bearing on the applicant’s qualifications as a licensee), cited in *Northeast Communications*, 15 FCC Rcd at 3291 ¶ 7.

⁴¹ Even where a party has placed its financial condition at issue, the Commission has “adhered to a policy of not authorizing the disclosure of confidential financial information ‘on the mere chance that it might be helpful.’” (continued....)

16. Nor are we persuaded by *Kimberly Clark Corporation*, where a licensee sought confidential treatment for its entire response to an Enforcement Bureau inquiry regarding the licensee's operations, including information that was available on the Commission's web site.⁴³ In contrast, ACL and NUSCO sought narrow relief by requesting confidentiality for only limited and discrete provisions of the Agreement, leaving the vast majority of the text accessible for public inspection.⁴⁴

17. For many of the same reasons, we also conclude that disclosure of the redacted terms to PSI under a protective order is not appropriate in this case. A protective order is intended to "strike[] an appropriate balance" between protecting filers from competitive harm and ensuring that parties to a proceeding are able to comment so as to protect their interests.⁴⁵ As concluded above, PSI fails to demonstrate a valid interest that would be advanced by such an order.⁴⁶ We find no grounds to grant PSI's alternative request for the special remedy a protective order offers, given the chance of competitive harm to ACL and NUSCO. Consequently, we conclude that the Division properly denied PSI's request for a protective order.

18. *Conditioning the Grant on Outcome of Auction Proceedings*. PSI asserts that the Division's failure to expressly "condition the grant [of the assignment application] on the outcome of Auction Nos. 57 and 61 appears to be an abuse of discretion," because if PSI prevails in its pending auction challenges, the authorization may be set aside.⁴⁷ We do not agree. As PSI concedes, the Commission has discretion in determining whether or not to impose conditions in granting an assignment application.⁴⁸ PSI does not show how grant without the requested condition harms PSI's position or weakens the Commission's authority to take appropriate action in the future, should ACL be found to have engaged in misconduct. Commission consent to an assignment application does not compel the parties to consummate the transaction, and they do so at their own risk, including the risk that the grant might subsequently be rescinded.⁴⁹ On the record before us, we find no basis to conclude that the Division abused its discretion

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Confidentiality Order, 13 FCC Rcd at 24823 ¶ 8 (quoting *Classical Radio for Connecticut, Inc., Memorandum Opinion and Order*, 69 F.C.C. 2d 1517, 1520 n.4 (1978)). PSI's assertion that the redacted portions "may relate to the above referenced assignment application" is speculative. See Application for Review at 10 (emphasis added).

⁴² See, e.g., *TeleCorp PCS, Inc., Memorandum Opinion and Order*, 16 FCC Rcd 3716, 3738 ¶ 53 (WTB 2000). Contrary to PSI's contention, see Application for Review at 8, the fact that only the price, and no other terms, were redacted from the agreement at issue in that case does not render this principle inapplicable to the present matter.

⁴³ *Kimberly Clark Corporation, Order*, 22 FCC Rcd 3703, 3704 ¶¶ 4-5 (EB SED 2007).

⁴⁴ See NUSCO Opposition at 7.

⁴⁵ See, e.g., *Gregory F. Intoccia, Letter*, 10 FCC Rcd 13462, 13465 (CCB 1995).

⁴⁶ See *Confidentiality Order*, 13 FCC Rcd at 24824 ¶ 9 (recognizing that, if there is a "specific public purpose," disclosure under a protective order "may serve the dual purpose of protecting competitively valuable information while still permitting limited disclosure" for that specific purpose).

⁴⁷ Application for Review at 12-13. According to PSI, "[i]f ACL is found to have violated antitrust laws and the Commission rules by entering into a *per se* illegal bid-rigging agreement with a Commonly Controlled Entity in Auction No. 61, [then ACL's] bidding agreement with another commonly Controlled Entity in Auction No. 57 may also be a violation . . . and [ACL] would be subject to . . . sanctions." *Id.* at 11.

⁴⁸ See, e.g., *AT&T Wireless Services, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21549-50 ¶ 51 (2004), cited in *Order on Reconsideration*, 22 FCC Rcd at 1598 n.19. While conceding such discretion, PSI objects to the Division's reliance on this decision on the grounds that only non-Commission related conduct was at issue in that case. See Application for Review at 12-13. PSI's focus on the conduct at issue is unavailing, as the exercise of discretion to impose a condition necessarily entails taking into account the specific facts of each case.

⁴⁹ See *Improvement Leasing Co., Memorandum Opinion and Order*, 73 F.C.C. 2d 676, 684 ¶ 19 (1979) (noting that applicants close at their own risk "with the full understanding that they may ultimately be required to undo the

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in not conditioning consent to the assignment application on the outcome of PSI's pending challenges to Auctions Nos. 57 and 61.

IV. CONCLUSION AND ORDERING CLAUSES

19. Nothing in the Application for Review persuades us to change the Division's decision. Based on the evidence before us, we find that conditioning the grant on PSI's pending appeals of the Bureau's auction decisions is unnecessary, and that PSI's petition was properly treated as an informal request under Section 1.41 without resolving the issue of PSI's standing. Moreover, we find that the confidentiality request concerning the Agreement demonstrated that protection of the redacted material is warranted. Therefore, we affirm the *Order on Reconsideration*, and deny the Application for Review.

20. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by Paging Systems, Inc. on March 1, 2007 IS DENIED.

21. IT IS FURTHER ORDERED that the Motion for Leave to File Supplement to Application for Review filed by Paging Systems, Inc. on May 14, 2007 IS GRANTED, and the Motion for Leave to File Second Supplement to Application for Review filed by Paging Systems, Inc. on July 2, 2007 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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transaction" and that "consummation in no way prejudices the Commission's ability to take any remedial action it may consider necessary at a future date"), *aff'd sub nom.* Washington Association for Television and Children v. FCC, 665 F.2d 1264 (D.C. Cir. 1981). That is always the case, regardless of whether conditions are attached to the consent, and regardless of whether the decision has become administratively final. *See, e.g.,* Pacific Gas and Electric Company, *Memorandum Opinion and Order*, 18 FCC Rcd 22761, 22764 ¶ 9 (2003) (noting that the courts have recognized that "administrative finality is not absolute," and that equity doctrines may permit reopening a case "to avoid a substantial injustice"); Advanced Communications Corp., *Memorandum Opinion and Order*, 18 FCC Rcd 2926, 2930 ¶ 8 (2003) (stating same and noting that "injustice may grow "out of misconduct undercutting the integrity of the administrative . . . process").